**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-652**

State of Minnesota, ex rel., Kelly Ray Bottomley, petitioner,
Appellant,

vs.

Joan Fabian, Commissioner of Corrections,
Respondent.

**Filed June 15, 2010**
**Affirmed**
**Toussaint, Chief Judge**

Chisago County District Court
File No. 13-CV-10-36

David W. Merchant, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Kelly S. Kemp, Assistant Attorney General, St. Paul, Minnesota; and

Krista J. Guinn Fink, St. Paul, Minnesota (for respondent)

Considered and decided by Toussaint, Chief Judge; Connolly, Judge; and Bjorkman, Judge.

**U N P U B L I S H E D  O P I N I O N**

**TOUSSAINT**, Chief Judge

This expedited appeal is from an order denying appellant Kelly Ray Bottomley's petition for a writ of habeas corpus challenging his continued incarceration by the

Minnesota Department of Corrections (DOC) past his supervised release date. We affirm.

## D E C I S I O N

Bottomley was sentenced in Kandiyohi County in January 2009 for failing to register as a predatory offender. He received an executed sentence of 26 months. Bottomley's scheduled institutional release date was September 29, 2009. But Bottomley did not have an approved residence, as was required under his conditions of supervised release. Bottomley was released from MCF-Faribault to the custody of his supervising agent and was transported to the Kandiyohi County Jail, where he was allowed to make phone calls to attempt to arrange a residence. This was unsuccessful, however, and Bottomley was charged with violating the release condition that he have an approved residence.

At the revocation hearing, the Hearings and Release Unit (HRU) officer found that Bottomley did not have an approved residence on September 29, which was a violation of the conditions of his supervised release. The officer noted that the supervising agent described at the hearing the investigation of possible placement at several residences and that "the Viking Motel and DOC Leased Housing are not an option." The officer noted that the "agent is currently seeking Emergency Housing Funds for the offender." Bottomley was assigned 90 days of additional incarceration time. The order noted that Bottomley could be released without another hearing if he had an agent-approved release plan.

At the expiration of the 90-day period, HRU held another hearing because there was still no agent-approved housing for Bottomley, a Level II sex offender. Bottomley was assigned an additional 60 days of incarceration. The HRU decision states:

> The Agents are requested to explore all release options. To include the Modified Work Release Program at any County Jail in their area of supervision. This could be Kandiyohi, Meeker, or Wright Counties. The Agents are also asked to explore a private residence being submitted by the Case Manager. The Case Manager is requested to contact the Agents ASAP regarding the offender's placement on Modified Work Release. [Bottomley] indicated he would love to be released on the Modified Work Release Program. This would uphold public safety, and afford the offender an opportunity to find housing and employment prior to the expiration of sentence.

Bottomley filed a petition for a writ of habeas corpus, challenging his continued incarceration. The district court denied the petition.

The district court's findings in support of its ruling on a petition for habeas corpus are entitled to great weight and will be upheld if reasonably supported by the evidence. *Northwest v. LaFleur*, 583 N.W.2d 589, 591 (Minn. App. 1998), *review denied* (Minn. Nov. 17, 1998). Questions of law, however, are reviewed de novo. *State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 26 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006).

Bottomley argues that he was not "actually," or "legitimately" "release[d]" when, upon reaching his release date, he was placed in the Kandiyohi County Jail due to the lack of an "approved residence."

The statute defining the length of an offender's term of imprisonment does not define the term "release" or specify what must happen at the end of the term of imprisonment. *See* Minn. Stat. § 244.05 (2008). Obviously, for offenders like Bottomley

placed on "supervised" release, the "release" from prison comes with certain conditions. These may include daily curfews, electronic surveillance, and random drug testing, conditions that cannot be violated until the offender is at liberty to violate them. But offenders like Bottomley, who are placed on intensive supervised release, may be required to submit to "house arrest" at a residence approved by their agent. Minn. Stat. §§ 244.05, subd. 6, .15, subd. 3(a) (2008). The failure to have such a residence is a violation that may be apparent before release and may be verified immediately upon release.

Bottomley was released from the custody of the state correctional facility. He became subject to the conditions of his intensive-supervised-release agreement. Under that agreement, which required "house arrest" for the first phase and which required an "approved residence," Bottomley was properly detained in the Kandiyohi County Jail when he lacked an "approved residence" to go to. This did not change the fact that he had been "released" from prison.

Bottomley attempts to bolster his argument by citing *Carrillo v. Fabian*, 701 N.W.2d 763 (Minn. 2005). But, as respondent Joan Fabian, Commissioner of Corrections, points out, *Carrillo* does not address this problem. *Carrillo* involved a disciplinary violation occurring during the term of imprisonment and a sanction for that violation that delayed the *date of release*. 701 N.W.2d at 766-68. It did not involve a problem arising in the transition from prison to supervised release, and, therefore, the court did not have to decide what "release" entails.

Bottomley cites no statute requiring that an inmate be at liberty for any period of time when his term of imprisonment has ended. Bottomley was released from prison even though it was in the company of a parole agent and for transport to the county jail.

Bottomley argues, however, that this "anemic" form of "release" is contrary to the legislative intent, which is that only a disciplinary sanction should deprive a prisoner of his supervised-release date. The DOC responds that it has broad authority to determine the conditions of intensive supervised release and that the condition that the offender have an approved residence is essential to the ability to supervise offenders on intensive supervised release.[1]

This court has held that, although there may be no duty to find a residence for an intensive-supervised-release offender, the DOC has an obligation to consider restructuring the offender's release plan when there is a possibility that an appropriate residence is available in a neighboring county. *State ex rel. Marlowe v. Fabian*, 755 N.W.2d 792, 796 (Minn. App. 2008).

Bottomley, who was convicted in Kandiyohi County, was transported to the Kandiyohi County Jail for temporary housing upon his release. There, he was allowed to

[1] Fabian's brief asserts that house arrest during phase 1 of intensive supervised release is legislatively mandated, citing Minn. Stat. § 244.15, subd. 3. In his reply brief, Bottomley correctly points out that Minn. Stat. § 244.15, subd. 3, applies to intensive community supervision, an early-release program, not intensive supervised release, a "parole" period that begins only after completion of the term of imprisonment. Fabian's counsel has conceded this point at oral argument. Thus the requirement of house arrest for intensive supervised release is a condition chosen by the DOC, not one mandated by the legislature. But the heart of the DOC's argument is that "a suitable residence is critical" to a predatory offender's agent's ability to adequately supervise him. Bottomley concedes that the legislature has *authorized* house arrest for offenders on intensive supervised release. *See* Minn. Stat. § 244.05, subd. 6.

make phone calls to try to find a residence, and his supervising agent investigated two possible placements. The agent sought "Emergency Housing Funds" for Bottomley. At the December 2009 review hearing, Bottomley's supervising agents were requested "to explore all release options," including modified work release in neighboring counties, which would allow Bottomley "an opportunity to find housing and employment prior to the expiration of sentence."

Thus, the DOC is not arbitrarily limiting Bottomley's placement options but appears to be actively exploring alternatives that will allow him to be released from custody on intensive supervised release. This is sufficient to comply with *Marlowe*. In *Marlowe*, the DOC failed to consider "a suitable residential placement . . . available in a neighboring county." *Id.* That is not the case here.

Bottomley also argues that the DOC violated his right to due process by revoking his supervised release solely because he did not have an approved residence. He argues that the "intentional and inexcusable" requirement for probation revocation should apply to revocation of supervised release.

Bottomley further argues that his lack of an approved residence did not constitute a violation of any supervised-release condition that had "actually" been imposed on him. Bottomley appears to argue that the only "actual" condition was that he not refuse to live at an approved residence and that the failure to *find* such a residence is not a violation. He also argues that the DOC's own rules and policies are ambiguous as to who is responsible for finding an "approved residence."

In Minnesota, probation cannot be revoked without a finding that the violation was "intentional or inexcusable." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). But this requirement is not derived from any constitutional requirement of due process. The *Austin* court cited a more general, policy-based holding that revocation cannot be a "reflexive reaction" to technical violations. *Id.* at 251. But it did not cite due process as requiring an "intentional or inexcusable" violation.

Bottomley, nevertheless, argues that it is a violation of due process to revoke supervised release for "circumstances entirely beyond the control of the [offender]." This court, however, has affirmed the revocation of probation for the failure to meet a condition of probation that was *not* due to the defendant's actions but rather to the lack of funding for the defendant's court-ordered treatment. *State v. Morrow*, 492 N.W.2d 539, 544-45 (Minn. App. 1992). *Morrow* cites a Supreme Court decision as holding that due process does not preclude revocation of probation "where the probationer does not intentionally violate a term of probation." *Id.* at 545 (citing *Bearden v. Georgia*, 461 U.S. 660, 668, 103 S. Ct. 2064, 2070 n.9 (1983)); *see also State v. Thompson*, 486 N.W.2d 163, 165 (Minn. App. 1992) (holding that probation could be revoked when treatment program that was condition of probation ceased to exist).

*Morrow* does hold that the decision to revoke probation must include some consideration of whether there are alternative measures available other than imprisonment "to satisfy the state's penological interests." 492 N.W.2d at 545. But here the DOC has considered alternative measures, particularly in the form of Modified Work Release, including work release in counties other than Bottomley's county of

commitment.

Bottomley's argument that he could violate his condition of release only by *refusing* an approved residence would place the sole burden on the DOC to find Bottomley a residence. But this court has rejected the argument that the DOC has such a duty. *See State ex rel. Marlowe*, 755 N.W.2d at 796 (citing unpublished opinions).

Bottomley also argues that the circumstance of his having no approved residence existed *prior* to his release and therefore cannot be a violation of his conditions of intensive supervised release. But although Bottomley in fact did lack an "approved residence" before his release date arrived, on the date of Bottomley's release, the supervising agent investigated additional possible placements, so that a new violation, or at least a continuation of the earlier violation, occurred after Bottomley's release.

Thus, we conclude that the DOC did not violate the statutory requirement of "release," or this court's holding in *Marlowe*, by transporting Bottomley to the county jail for a continued but fruitless search for an "approved residence" when he reached his supervised-release date. We also conclude that the revocation of Bottomley's supervised release for the lack of an "approved residence" did not violate due process.

**Affirmed**.